



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 4, 1992

Ms. Georgia Flint
Acting Commissioner
Department of Insurance
P. O. Box 149104
Austin, Texas 78714-9104

OR92-48

Dear Ms. Flint:

Your predecessor in office asked whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. This request was assigned ID# 13333.

The State Board of Insurance (the board) has received a request for "a copy of all workers' compensation insurance experience modifiers of less than .60 for employers with policies effective during the months of November and December of 1990," to include only "the name, address and experience modifier percent." Your predecessor claimed that this information is excepted from required public disclosure by sections 3(a)(4) and 3(a)(10) of the Open Records Act.

Section 3(a)(4) excepts from required public disclosure "information which, if released, would give advantage to competitors or bidders." Section 3(a)(4) applies primarily to competition for governmental contracts and specifically protects the sealed bid process; decisions under section 3(a)(4) generally involve specific commercial and contractual matters. Open Records Decision No. 463 (1987). Section 3(a)(4) is intended to protect the government's interest in purchasing by assuring that the bidding process will be truly competitive. Open Records Decision No. 583 (1990). It has not been demonstrated how this issue involves a competitive bidding process and how release of the requested information would harm the governmental body's purchasing interests in a specific situation. The board's application of the 3(a)(4) exception appears to be inappropriate in this instance;

accordingly, you may not withhold any of the requested information under section 3(a)(4).

Pursuant to section 7(c) of the act, third parties whose proprietary interests may be compromised by disclosure of the requested information have been notified and have been asked to submit briefs to support a section 3(a)(10) claim. In response, we have received letters from Industrial Security Services Corporation (ISS), Bill McDavid Pontiac-GMC-Honda, Inc (McDavid), and National Abatement Services, Inc. (NAS). ISS claims that "costs of workers' compensation and other kinds of insurance [are] proprietary" and "to make such data public would . . . limit our ability to compete against . . . large competitors." McDavid claims that "disclosure of this information will harm my company's ability to compete in the marketplace." NAS asserts that the requested information is "sensitive in nature and could be of an advantage to a competitor" if released. Because we have received letters from no other companies to which portions of the requested information might relate, we will limit the scope of this ruling to the claims made by ISS, McDavid, and NAS. Information relating to other companies must be released.

Section 3(a)(10) excepts from required public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." In making trade secret determinations under section 3(a)(10), this office will accept a claim as valid if the claimant establishes a *prima facie* case for its assertion of trade secrets that is unrebutted *as a matter of law*. Open Records Decision No. 552 (1990) at 5. Whether a claimant makes a *prima facie* case depends on whether its arguments, as a whole, correspond to the criteria for trade secrets detailed in the Restatement of Torts and adopted by the Texas courts. *Id.* at 2-3. Section 3(a)(10) also protects certain commercial and financial information that need not constitute a trade secret. Open Records Decision No. 592 (1991) held that "[i]n order to be excepted from required public disclosure under section 3(a)(10) of the Open Records Act, 'commercial or financial information obtained from a person' must be 'privileged or confidential' under the common or statutory law of Texas." When an agency or company fails to provide relevant information regarding factors necessary to make a section 3(a)(10) claim, there is no basis to withhold the information under section 3(a)(10). *See* Open Records Decision No. 402 (1983).

We have examined the documents submitted to us for review and have considered the arguments presented by the board and by ISS, McDavid, and NAS.

Neither the board nor the three companies have made a *prima facie* case that the requested information constitutes a trade secret. Moreover, it has not been demonstrated how the requested information is deemed privileged or confidential under the common or statutory law of Texas. Accordingly, the requested information may not be withheld from required public disclosure under section 3(a)(10) of the Open Records Act and must be released.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR92-48.

Yours very truly,



Susan Garrison
Assistant Attorney General
Opinion Committee

SG/GK/mc

Ref.: ID#s 13333, 13471, 13577

Enclosures: Open Records Decision No. 592

cc: Mr. Joseph C. Boggins
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